IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 550 OF 2005

V.K. Jain and others Applicants

Versus

Mr. Pratap V. Padode & Anr. ...Respondents

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Mr.S.Naphade i/b M.K.Nesari, Advocate for Applicants

Ms. Kamal Jain, Advocate for Respondent No.1

Mr. Y.S. Shinde, A.P.P. for State.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATE OF RESERVING THE ORDER : 8TH JUNE, 2005

DATE OF PRONOUNCING THE ORDER : 21ST JUNE, 2005

P. C.:-

1. Heard both sides.

2. Through this application under Section 482 of Cr.P.C., the applicants are seeking quashing of process issued against them under Section 406 of I.P.C. by order dated 24.8.2004. The said process has been issued against the applicants in Complaint No.498/SW/04 which is pending before the learned Additional Chief Metropolitan Magistrate, 33rd Court Ballard Estate, Mumbai.

3. However, in my opinion, the applicants have an efficacious remedy i.e. of preferring a revision before the Sessions Court against the order of the Magistrate issuing process. Hence, I expressed the view that it would be appropriate that the applicants prefers revision before the concerned Sessions Court against the order of Magistrate issuing process.

4. On expressing this opinion, the learned counsel for the applicants pointed out the recent decision of the Supreme Court in the case of **Adalat Prasad Vs. Rooplal Jindal and Others 2004 (4) Mh.L.J. 274.** The learned advocate has submitted that in the said decision, it is observed in para 16 that in a case where process has been issued, in the absence of any review power or inherent power with the subordinate Criminal Courts, the remedy lies in invoking Section 482 of Criminal Procedure Code. Thus the learned advocate has submitted that in view of the observations of the Supreme Court, the applicants have approached the High Court for relief as both the lower Courts i.e. the Magistrate or Sessions Court cannot grant the relief.

5. The learned advocate has also placed reliance on another decision of the Supreme Court in the case of **Subramanium Sethuraman Vs. State of Maharashtra &**

Anr. 2005 (1) Mh.L.J. 626. The learned advocate has submitted that in the said decision, the Supreme Court has held that in a case where the process is issued the only course available to the aggrieved party is to challenge the issuance of process by way of petition under Section 482 of the Criminal Procedure Code.

6. I have carefully perused the said decisions. In the case of **Adalat Prasad**, the question which came up for consideration before the Supreme Court was whether the view of the Supreme Court in **K.M.Mathew Vs. State of Kerala and another 1992(1) SCC 217,** wherein it was held that if the Magistrate had issued process, he could also recall such an order, was a correct view or not. Thus, the question which fell for consideration before the Supreme Court in the case of **Adalat Prasad** was whether a Magistrate could recall process. It was the only question which fell for consideration. It is to be noted that it was the only question argued, deliberated and decided by the Supreme Court. While deciding the case of **Adalat Prasad,** the Supreme Court was not considering the question whether a revision could be preferred against the order of Magistrate issuing process. In fact, in the case of **Adalat Prasad,** after the observations in para 16 stated above, in para 18, the Supreme Court has observed thus:

> "18. In view of our above conclusion, it is not necessary for us to go into the question whether order issuing a process amounts to an interim order or not".

. Thus, in the case of Adalat Prasad, the Supreme Court has not decided the issue whether a revision against such an order is maintainable or not as the said issue was not raised. In fact from the observations in para 18, it is clear that the Supreme Court has not gone into the question whether an order issuing process is an interlocutory order or not and hence, whether a revision against such an order is maintainable or not.

7. As far as the decision in the case of **Subramaniam Sethuraman** is concerned, the question which fell for consideration before the Supreme Court was whether the decision in the case of **Adalat Prasad** would require reconsideration as in the case of **Adalat Prasad** the Court proceeded on the basis that the case was a summons case but in reality it was a warrant case covered by Chapter XIX of the Criminal Procedure Code. That was the question which arose for consideration. Again the issue for consideration before the Supreme Court was whether the "Magistrate" could recall the order issuing process in a summons case as well as warrant case. The Supreme Court held that it would not make any difference whether a case

was a summons case or a warrant case and in both the cases the Magistrate did not have the power to recall process. In the case of **Subramanium Sethuraman,** the observations in the case of **Adalat Prasad,** have been quoted and it was held that the fact that it was a warrant case and **K.M.Mathew** pertained to summons case would not make the law laid down in **Adalat Prasad's** case bad law.

8. Thus in both cases, the question which arose for consideration was whether the "Magistrate" could recall process which was issued by him. The sole question which arose for consideration in the case of **Adalat Prasad** was whether the view in the case of **K.M.Mathew** that the Magistrate could recall process issued by him was correct or not. In the said case, the question did not arise for consideration whether a revision could be preferred before the Sessions Court against the order issuing process. Moreover, in **Adalat Prasad's** case as is clear from para 18, the said question is not gone into. It is not the ratio of the judgment in **Adalat Prasad's** case that a revision against the order issuing process is not maintainable. It can be said to be the *ratio decidendi* of the judgment if the following requirements are met:

(a) The issue involved must be directly and substantially in issue in the case.

(b) The issue needs to be decided, and

(c) there are reasons given in the judgment while deciding the issue.

. If the judgment in the case of **Adalat Prasad** is considered, it is seen that what was in issue was whether the "Magistrate" could recall the order issuing process. The ratio of the judgment would have to be applied to cases wherein the Magistrate is called upon to recall process and the ratio would not apply to cases where the Sessions Court is called upon to exercise its revisional jurisdiction in cases where process has been issued by the Magistrate.

9. The Supreme Court has observed in the case of **Commissioner of Income Tax Vs. Sun Engineering Works (P) Ltd. reported in (1992) 4 SCC 363** as under:

> "...It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the question which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court to support their reasonings. In **Madhav Rao Scindia Vs. Union of India,** this Court cautioned:

> "It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme court, divorced from its context as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment".

10. In the case of **Adalat Prasad** or **Subramanium Sethuraman**, the question did not arise for consideration as to whether a revision can be preferred against the order of Magistrate issuing process. Hence, the one line in paragraph 16 of **Adalat Prasad** or even **Subramaniaum Sethuraman** cannot be divorced from the context of the question under consideration and treated as complete law declared on the subject that a revision against an order issuing process is not maintainable. It cannot be said to be the ratio of **Adalat Prasad** that a revision is not maintainable especially also keeping in mind the observations in paragraph 18 of **Adalat Prasad.** So also looking to the question under consideration in the case of **Subramanian Sethuraman,** it cannot be said to be the ratio in the said case that a revision against order issuing process is not maintainable.

11. In the case of **Bhaskar Industries Ltd. Vs. Bhiwani Denim & Apparels Ltd. and Anr. reported in 2002(1) Mh.L.J.81,** in relation to the powers of revision, the Supreme Court has observed that the interdict contained in Section 397(2) of the Code of

Criminal Procedure is that the powers of revision shall not be exercised in relation to any interlocutory order. Whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at an interlocutory stage. The Supreme court laid down that the safe test is that if the contention of the Petitioner who moves the superior court in revision, as against the order under challenge, is upheld, would the criminal proceedings as a whole culminate ? If they would, then the order is not an interlocutory order inspite of the fact that it was passed during any interlocutory stage. In the present case, if the contention of the present applicants in respect of the order issuing process is upheld the proceedings in the said case would come to an end, hence, in the light of the above decision, the order issuing process cannot be said to be an interlocutory order even though it may have been passed at an interlocutory stage.

12. Useful reference may also be made to the decision of the Supreme Court in the case of **K.K.Patel and another Vs. State of Gujrat and another; (2000) 6 SCC 195.** In the said case, a private complaint was filed against the appellants before the Court of Metropolitan Magistrate. The learned Magistrate issued process against the

appellants. The appellants filed an application for discharge. The objection which was raised before the learned Magistrate was that no sanction was obtained to prosecute the accused. The said application came to be dismissed. Thereafter, the appellants filed revision before the Sessions Court wherein two grounds were raised, the first was that no sanction was obtained to prosecute the accused persons and the second objection was that no complaint could be filed after one year from the date of the act complained of. The learned Sessions Judge upheld the objections of the appellants i.e. accused persons and the process issued by the trial Court was quashed by the Sessions Court. The said order was challenged before the High Court and the High Court set aside the judgment of the Sessions Court mainly on the ground that the Sessions Court should not have entertained the revision at all as the order challenged before it was only an interlocutory order. The Supreme Court has held in para No.10 that the appellants were not estopped from canvassing on that additional ground also before the Sessions Court in revision as they were challenging therein the very order of issuance of process against them.

. In para 11 the Supreme Court held that the view of the learned Single Judge of the High Court that no revision was maintainable on account of the bar

contained in Section 397(2) of the Code, is clearly erroneous.

. It is further observed that in deciding whether an order challenged is interlocutory or not, the sole test is not whether such order was passed during the interim stage but the feasible test is whether by upholding the objection raised by a party, it would result in culminating the proceedings.

. It is further observed in the said para that:

> "In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable. "

13. In the case of **Amarnath Vs. State of Haryana and another (1977) 4 SCC 137,** it has been held that the order of Magistrate issuing summons to the accused is not an interlocutory order. In respect of the Magistrate issuing process, the Supreme Court in para 10 has observed thus:

> "So long as the Judicial Magistrate had not passed this order, no proceedings were started against the appellants, nor were any such proceedings pending against them. It was only with the passing of the impugned order that the proceedings started and the question of the appellants being put up for trial arose

> for the first time. This was undoubtedly a valuable right which the appellants possessed and which was being denied to them by the impugned order. It cannot, therefore, be said that the appellants were not at all prejudiced, or that any right of their's was not involved by the impugned order. It is difficult to hold that the impugned order summoning the appellants straightaway was merely an interlocutory order which could not be revised."

14. The question as to what is an interlocutory order came up for consideration before the Supreme Court in the case of **Madhu Limaye Vs. State of Maharashtra; (1977) 4 S.C.C. 551.** In the said case, the complaint was filed before the Court of Sessions. Cognizance of the offence was taken by the Court of Sessions. Being aggrieved thereby the appellants preferred a revision before the High Court. The High Court rejected the said revision application on the sole ground that it was not maintainable in view of the provisions contained in sub-section (2) of Section 397 of the Code of Criminal Procedure. In the case of **Madhu Limaye** the decision in the case of **Amarnath (supra),** was considered and the three-Judge Bench of the Apex Court in the case of **Madhu Limaye** in para 7 has re-affirmed the decision in the case of **Amarnath** on the point that the impugned order of the Magistrate was not an interlocutory order. Hence, the order of the High Court was set aside and the matter was remitted back for disposal on merits.

15. In the case of **Madhu Limaye,** the Supreme Court considered the very issue whether the revision against the order taking cognizance or issuing process or framing charge was maintainable. The Supreme Court observed that a bar has been put in the way of the High Court (as also of the Sessions Court) for exercise of the revisional power in relation to any interlocutory order. It is further observed in para 10 that the order of the Court taking cognizance or issuing process is not an interlocutory order.

16. At this stage, the learned counsel for the applicants cited two more decisions in respect of his contention that the order of the Magistrate issuing process is an interlocutory order and hence, revision in respect of the same would not be maintainable. The said decisions are in the case of **Poonam Chand Jain & Anr. Vs. Fazru JT 2004 (9) SC 208** and the decision of the Federal Court in the case of **S.Kuppuswami Vs. The King; AIR 1949 FC 1**. As far as the case of **Poonam Chand** is concerned, the main question which arose for consideration was whether a second complaint could be filed. After holding that a second complaint could be filed in exceptional circumstances in paras 9, 10 and 11 the decisions in the case of **Adalat Prasad** and **Subramanian Sethuraman** have been discussed. In these paras the powers of

the "Magistrate" in respect of reviewing his own order issuing process have been discussed and not the powers of the Sessions Court to entertain a revision against the order of the Magistrate issuing process. It is true that the words "interlocutory order" has been used but applying the principles in the case of **Commissioner of Income Tax Vs. Sun Engineering Works** referred to in para 9 above, it cannot be said that paras 9 to 11 of the judgment in the case of **Poonamchand** lay down the ratio that a revision against an order issuing process is not maintainable.

17. Thereafter, in para 12 of the decision in the case of **Poonamchand,** various decisions of the Supreme Court have been referred to on the point whether the order issuing process is an interlocutory order and hence a revision against the same was maintainable or not before the Sessions Court. Reference has been made to **Rajendra Kumar Sitaram Pande Vs. Uttam and Anr. and K.K. Patel and Anr.** (supra) wherein it is held that such an order is not interlocutory and hence a revision in respect of the same is maintainable. It is pertinent to note that no where in the case of Poonamchand has it been observed that the law laid down in these two decisions is erroneous or incorrect or requires reconsideration.

18. The decision in the case of **S. Kuppuswami** was

considered by the Supreme Court in the case of **Madhu Limaye.** In the case of **S. Kuppuswami** it was observed that the test for a final order was that if the decision whichever way it is given, will finally dispose of the matter in dispute.

. In respect of the decision in the case of **Kuppuswami,** in the case of **Madhu Limaye** which is a decision by three Honourable Judges, it is further observed that:

> "But in our judgment such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so it will render almost nugatory the revisional power of the Sessions Court/or High Court conferred on it by Section 397(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the intention of the Legislature when it retained the revisional power of the High Court in terms identical to the one in the 1898 Code."....
>
> "There may be an order passed during the course of a proceeding which may not be final in the sense noticed in **Kuppuswami's case (supra)**, but yet it may not be an interlocutory order-- pure or simple. Some kinds of order may fall in between the two"....
>
> "The first two kinds are well-known and can be culled out from many decided cases. We may, however, indicate that the type of order with which we are concerned in this case, even though it may not be final in one sense, it surely

> not interlocutory so as to attract the bar of sub-section (2) of Section 397. In our opinion, it must be taken to be an order of the type falling in the middle course."

. Thus, it is seen that after considering the decision in the case of **Kuppuswami** in the case of **Madhu Limaye** the Bench of three Honourable Judges of the Supreme Court has held that order issuing process is not an interlocutory order and hence, revision against such an order is maintainable. Hence, the matter was remitted back to the High Court for considering the revision as the process was issued by the Sessions Court.

19. It may be stated here that from the observations of the Apex Court in para 10 and 13 in the case of **Madhu Limaye**, it is clear that the revisional power was being considered in respect of the High Court as well as the Sessions Court. Thus, from the decision in the case of **Madhu Limaye,** it is clear that an order issuing process is not an interlocutory order and hence, revision would be maintainable against the same. As far as the case of Poonamchand is concerned, the learned counsel for the applicants was unable to point out any para or sentence therein, wherein it has been specifically held or observed that no revision is maintainable in respect of an

order of the Magistrate issuing process. On the other hand in the case of Madhu Limaye it has been held that such an order is not an interlocutory order and revision in respect of the same would be maintainable. In any event, the decision in the case of Madhu Limaye having been rendered by a larger Bench than the one in the case of Poonamchand, the said decision would obviously prevail.

20. Moreover, it is to be noted that the decision in the case of Poonamchand is dated 15.10.2004. In a recent decision of the Supreme Court dated 11.3.2005 in the case of **S.K. Bhatt Vs. State of U.P. 2005 AIR SCW 1435,** the order of the High Court setting aside the order of the Sessions Court and remanding the matter back to the Sessions Court for deciding the revision on merits was challenged. The High Court had held that decision of the Sessions Court observing that order issuing summons is an interlocutory order and therefore, revision was barred, was incorrect and the order was set aside by the High Court and the matter was remanded back for deciding the revision on merits. In the Supreme Court besides praying that the above order of the High Court be set aside, a prayer was also made for expunging the remarks made by the High Court against the petitioner. It is pertinent to note that the Supreme Court did not set aside the said order of the

High Court remanding the matter back to the Sessions Court for deciding the revision on merits. In the said case leave was only granted to the petitioner to move an application before the High Court for expunging the remarks by which he felt aggrieved. Thus from this decision also it is clear that the order issuing summons or process against the accused is not an interlocutory order and revision against the same is maintainable.

21. Going back to the issue as to whether an order is an interlocutory order or not, in a majority decision by a Bench of five Judges of the Supreme Court in the case of **Mohan Lal Magan Lal Thacker Vs. State of Gujrat; AIR 1968 SC 733**, four tests were culled out in respect of whether a judgment or order can be said to be final or interlocutory. One of the tests is that "if the order in question is reversed would the action have to go on?" If due to the order being reversed, the action does not go on it would be an interlocutory order. The Apex Court in the case of **Madhu Limaye** has observed that applying the test in the case of **Mohan Lal** to the facts of the instant case, it would be noticed that if the plea of the appellant succeeds and the order of the Sessions Judge is reversed, the criminal proceeding as initiated and instituted against them cannot go on. Thus, an order issuing process would not be an

interlocutory order. After considering the decision in the case of **Kuppuswami**, Their Lordships in the case of **Madhu Limaye** have referred to the earlier decision of the Constitution Bench of the Supreme Court in the case of **Ramesh and another Vs. Gendalal M.Patni and others**, wherein in relation to what is the final order, it is observed as under:

> "The finality of that order was not to be judged by co-relating that order with the controversy in the complaint, viz. whether the appellant had committed the offence charged against him therein. The fact that that controversy still remained alive is irrelevant."
>
> **(EMPHASIS SUPPLIED)**

22. As observed earlier, after considering the case of **Kuppuswami** and various other decisions of the Supreme Court, it has been held in the case of **Madhu Limaye** that an order issuing process or summons is not an interlocutory order.

23. In addition to the decisions discussed above, useful reference may also be made to the case of **Rajendra Kumar Sitaram Pande and others Vs. Uttam and Another (1999) 3 SCC 134,** the main question before the Supreme Court was whether the order of Magistrate directing the issuance of process is an interlocutory order or not. The said question was directly in issue in the said case. The said issue

was decided giving detailed reasons. The Supreme Court held after giving detailed reasoning that the order of Magistrate directing issuance of process is not an interlocutory order and the revisional jurisdiction under Section 397 could be exercised against the same. In view of the above observations, it is clear that an aggrieved person against whom process has been issued, can prefer a revision against the order of the Magistrate issuing process. Thus, it is clear that the applicants have an efficacious remedy of preferring a revision against the order of the Magistrate issuing process.

24. From various decisions of the Supreme Court discussed above it is quite clear that an order issuing process is not an interlocutory order and hence a revision can be preferred against such an order. In these decisions the said issue was specifically considered and the said issue was decided giving detailed reasoning. Thus, it is clear that there is a specific provision in the Code in Section 397 for redressal of the grievance of the accused against whom process has been issued.

25. In respect of inherent powers of the High Court under Section 482 of Cr.P.C. in the case of **Madhu Limaye,** the three Judge Bench of the Apex Court observed that "one of the principles in relation to

the exercise of the inherent powers of the High Court which have been followed ordinarily and generally is that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of the aggrieved party." The present application is under Section 482 of Cr.P.C. As the applicants have an efficacious remedy of preferring revision against the order of Magistrate issuing process against them in view of the principles mentioned in para 8 in the decision in the case of **Madhu Limaye,** it is clear the power under Section 482 of Cr.P.C. ought not to be resorted to. In the case of **State Vs. Navjot Sandhu @ Apshan Guru and Ors. (2003) 6 SCC 641**, the Supreme Court has reiterated the above principles in the case of **Madhu Limaye** in relation to exercise of inherent power under Section 482 of Cr.P.C. After considering various earlier decisions including the decision in the case of **Pepsi Foods Ltd. Vs. Special Judicial Magistrate and Ors. (1998) 5 SCC 749**, it was held that inherent power under Section 482 of Cr.P.C. should not be exercised if there is a specific provision in the Code or any other enactment for redress of the grievance of the aggrieved party.

26. If one bears in mind the principle laid down in the case of **Madhu Limaye** in relation to the exercise of power of the High Court under section 482 of

Cr.P.C., it is clear such power should not be resorted to if there is specific provision in the Code for the redress of the grievance of the aggrieved party. As observed earlier, the applicants have an efficacious remedy of preferring revision in respect of the order of the Magistrate issuing process. Thus, as there is a specific provision in the Code for redressal of the grievance of the applicants, in my opinion, it would be appropriate that the applicants prefer a revision against the order of the Magistrate issuing process. This is the position in respect of application under section 482 Cr.P.C. As far as Writ Petitions seeking similar reliefs i.e quashing of process or proceedings in which process has been issued, are concerned, it would be advantageous to refer to a decision by five Honourable Judges of the Supreme Court in the case of **Thansingh Nathmal Vs. The Supdt. of Taxes Dubri and Ors. reported in AIR 1964 SC 1419.** In the said decision, it has been observed that when there is an efficacious alternate remedy, a Writ Petition ought not to be entertained. Thus, as in my view the accused person has an efficacious remedy of preferring revision before the Sessions Court such Writ Petitions ought not to be entertained and the aggrieved person ought to be given liberty to prefer revision before the Sessions Court.

27. Thus as in my opinion, when the applicants have an efficacious remedy of preferring revision before the Sessions Court against the order issuing process they should not be deprived of the same. Hence, in view of the discussion in the foregoing paras, in my opinion, it would be appropriate that the applicants prefer a revision before the concerned Sessions Court against the order issuing process against them.

28. Liberty is granted to the applicants to prefer necessary revision before the concerned Sessions Court for setting aside the process issued against them by the Magistrate. The learned counsel for the applicants prayed that stay may be granted to the proceedings before the trial Court for a period of three weeks from today. Looking to the facts and circumstances of this case the prayer appears to be reasonable and hence, the proceedings before the trial Court are stayed for a period of three weeks from today.

29. On the necessary revision being preferred by the applicants before the concerned Sessions Court, the concerned Sessions Court shall dispose of the same on merits after hearing necessary parties.

30. Office to issue authenticated copy of this order to the parties.

31. Criminal Application is disposed of.

Sd/-

(SMT.V.K. TAHILRAMANI, J.)

Date: 30th June, 2005.

. In the above order dated 21.6.2005, in para No. 19 in the second sentence and in para 24 in the first sentence, inadvertently the word "not" in respect of an interlocutory order remained to be typed. Hence, the necessary corrections have been made in the said paras and it is clarified that the relevant portion of the order reads that the order issuanance of process is not an interlocutory order.

Sd/-

(SMT.V.K. TAHILRAMANI, J.)